No. 96-1666

Supreme Court, U.S.
FILED
MAY 15 1997
OFFICE OF THE CLERK

In The
Supreme Court Of The United States
October Term, 1996

JOHN C. KUCEJ,
Petitioner,

v.

STATEWIDE GRIEVANCE COMMITTEE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

BRIEF OF THE RESPONDENT IN OPPOSITION

Counsel of Record for Respondent:

DANIEL B. HORWITCH
Statewide Bar Counsel
Statewide Grievance Committee
Second Floor - Suite Two
287 Main Street
East Hartford, CT 06118-1885
(860) 568-5157

Printed by
Brescia's Printing Services, Inc.
56 Connecticut Boulevard
East Hartford, CT 06108
528-4254

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

ARGUMENT 3

CONCLUSION 8

TABLE OF AUTHORITIES

CASES — Page

Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985) 6

In re Ruffalo, 390 U.S. 544 (1968) 3, 6, 7

Kucej v. Statewide Grievance Committee, 239 Conn. 449 (1996) . . . . . *passim*

STATUTES

Connecticut General Statutes §51-199 2

CONNECTICUT PRACTICE BOOK

§27F 3

§27J 3, 4

§27M 4

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent Statewide Grievance Committee respectfully requests that this Court deny the Petition for Writ of Certiorari of John C. Kucej which seeks review of the judgment and opinion of the Connecticut Supreme Court in this case.

STATEMENT OF THE CASE

The petitioner John C. Kucej has brought a petition for writ of certiorari asking this court to review the judgment of the Connecticut Supreme Court in *Kucej v. Statewide Grievance Committee*, 239 Conn. 449 (1996). This case held that the Statewide Grievance Committee did not violate the due process rights of the petitioner, an attorney, in imposing a public reprimand for attorney misconduct.

A complaint against the petitioner alleging attorney misconduct was filed with the statewide bar counsel on November 11, 1992. The complaint was investigated in accordance with the Connecticut rules of court. On February 17, 1994, the Statewide Grievance Committee reprimanded the petitioner for misconduct.

In March, 1994, the petitioner filed an appeal of the Statewide Grievance Committee reprimand in the Connecticut Superior Court. The petitioner claimed, *inter alia*, that the decision of the Statewide Grievance Committee to reprimand for actions upon which a local grievance panel originally found no probable cause of misconduct was barred by the doctrines of res judicata, collateral estoppel and

double jeopardy. After oral argument, the Superior Court issued its decision in December, 1995, finding that the Statewide Grievance Committee did not violate the petitioner's rights. The petitioner filed a motion to reargue which was denied by the Superior Court.

The petitioner timely appealed the judgment of the Superior Court to the Connecticut Appellate Court and on June 13, 1996, the Connecticut Supreme Court transferred the appeal to itself, pursuant to its authority under Connecticut General Statutes §51-199[1] and Connecticut Rules of Practice §4023. On December 17, 1996, the Connecticut Supreme Court affirmed the judgment of the trial court holding that the Statewide Grievance Committee did not violate the due process rights of the petitioner or pursue matters barred by res judicata or collateral estoppel. *Kucej v. Statewide Grievance Committee*, 239 Conn. 449 (1996). On December 23, 1996, the petitioner filed a motion for reargument. On January 16, 1997, the Connecticut Supreme Court denied the petitioner's motion.

REASONS FOR DENYING THE WRIT

The Petition raises no issue that warrants review. No significant or unsettled question of federal law is presented that has not already been settled by this Court. The

[1]Connecticut General Statutes §51-199(c) provides in part that "[t]he Supreme Court may transfer to itself a cause in the Appellate Court.

Decision of the Connecticut Supreme Court is correct on the merits as to issues raised by this petition. It is not contrary to any applicable decisions of this Court.

ARGUMENT

The decision of the Connecticut Supreme Court does not conflict with *In re Ruffalo*, 390 U.S. 544 (1968) and does not subject an attorney in a disciplinary proceeding to double jeopardy.

The attorney discipline process in Connecticut, in cases of misconduct not warranting court action, is essentially a three-stage process. A complaint, after it is filed with the statewide bar counsel, Connecticut Practice Book Section (hereinafter "P.B. §") 27F(a) is first reviewed by a local grievance panel to determine whether probable cause exists that the attorney is guilty of misconduct. P.B. §27F(f). After the panel makes its determination, the case is assigned to a subcommittee of the Statewide Grievance Committee. P.B. §27J(a). If there has been a finding of probable cause by the local panel, the subcommittee of the Statewide Grievance Committee conducts a hearing and issues a proposed decision. The proposed decision is then reviewed by the full Statewide Grievance Committee. If the local panel finds no probable cause of misconduct, the subcommittee of the Statewide Grievance Committee reviews the finding and if it agrees that there is no probable cause, it may dismiss the complaint; if it disagrees with the local panel, it may find that there does exist probable cause of misconduct and conduct a hearing (the hearing may be conducted by a different subcommittee), after which a

proposed decision is issued and subsequently reviewed by the full Statewide Grievance Committee. P.B. §§27J(c), (e); 27M.

In the instant matter the complaint against the petitioner contained essentially four claims of misconduct. The complaint was assigned to a local grievance panel to conduct an investigation and render a determination whether there existed probable cause that the petitioner was guilty of misconduct. The grievance panel filed with the Statewide Grievance Committee its determination that there existed probable cause that the petitioner was guilty of misconduct relative to two claims in the complaint. The determination of the panel was silent with respect to the other two claims.

The Statewide Grievance Committee assigned the file to a subcommittee. The subcommittee scheduled a hearing to address the grievance panel's finding of probable cause. After conducting the hearing, the reviewing committee issued a decision that there did not exist clear and convincing evidence of misconduct on the two claims upon which the grievance panel found probable cause. In its decision, the subcommittee also announced it found probable cause of misconduct on one of the two claims not addressed by the local grievance panel and not the subject of the subcommittee's hearing.

The finding of probable cause of misconduct by the subcommittee was the subject of a hearing by a second subcommittee of the Statewide Grievance Committee. After its hearing, the second subcommittee concluded that there existed clear and convincing evidence that the petitioner was guilty of misconduct.

In his petition, the petitioner misstates the facts of this case. The petitioner states that the claims upon which the local panel found no probable cause of misconduct were reviewed and dismissed by the full Statewide Grievance Committee. There is no evidence supporting the petitioner's claim that, before it assigned the file to a subcommittee, the Statewide Grievance Committee reviewed and dismissed those portions of the complaint upon which the local panel found no probable cause of misconduct. (The petitioner's only support for his claim appears on page 11 of his petition where he cites to a *nonexistent* page 67 of his Appendix). In fact, as the Connecticut Supreme Court found, the entire file of the complaint was assigned to a subcommittee which had the authority, which it properly exercised, to both conduct a hearing on the local panel's finding of probable cause of misconduct on two claims and to review the local panel's finding of no probable cause on the remaining claims. The court concluded that the Practice Book Sections providing for a subcommittee reviewing a local grievance panel's finding of no probable cause of misconduct and conducting a hearing on the local grievance panel's findings of probable cause of misconduct were not mutually exclusive.

Supporting the conclusion of the Connecticut Supreme Court is the hearing notice mailed to the petitioner, referenced by the petitioner (Petition at 10) and reproduced in petitioner's appendix (Pet. App. 3). Significant is the heading of the document, "GRIEVANCE *HEARING*" (emphasis added) and language contained therein: "The subject for review *at the hearing* will only be the issue or issues related to the probable cause finding." (Emphasis added). As the Connecticut Supreme Court concluded, the hearing notice limited the hearing to issues on which there had been a finding of probable cause of misconduct and did

not preclude a separate review by the subcommittee of the claims upon which the local panel found no probable cause of misconduct. *Kucej v. Statewide Grievance Committee*, *supra* 457-461.

In finding probable cause on claims on which the local grievance panel did not find probable cause, the subcommittee of the Statewide Grievance Committee did not violate the petitioner's rights as defined in *In re: Ruffalo*, *supra*. Although the subcommittee had conducted a hearing on the grievance complaint, that hearing focused only on the local grievance panel's findings of probable cause and not on the issues upon which the local grievance panel determined that there was no probable cause of misconduct. Thus, the subcommittee's finding of probable cause was not a result of testimony elicited from or offered by the petitioner at its hearing and the petitioner was not trapped by his testimony. *See*, *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 655 (1985). The Connecticut Supreme court specifically noted that the record of the disciplinary proceedings contained no evidence that the petitioner testified at the first subcommittee's hearing about the issues upon which the local grievance panel found no probable cause of misconduct. The Supreme Court also found that the petitioner did not otherwise attempt to establish before the Superior Court that he did testify about those issues at the subcommittee hearing. *Kucej v. Statewide Grievance Committee*, 239 Conn. 449, 464 n.28.

Because the issues upon which the local grievance panel found no probable cause of misconduct had not been reviewed by the Statewide Grievance Committee before the file was assigned to the subcommittee, those issues were not decided by the Statewide Grievance Committee. Since there

had not been an adjudication of those issues by the Statewide Grievance Committee, and no final decision had been issued on any part of the complaint, it cannot be concluded that the review by the subcommittee of the issues upon which the local panel found no probable cause of misconduct constituted double jeopardy or a violation of the principles of collateral estoppel or res judicata.

After the subcommittee of the Statewide Grievance Committee found probable cause of misconduct on issues not addressed at its hearing, the petitioner was provided with written notice of the finding of probable cause, ample time to prepare to respond to the claims at a hearing, and a hearing to respond to the charges. The petitioner was, therefore, provided with the protections required by *In re: Ruffalo*, *supra*.

The petitioner fails to state sufficient grounds to grant the petition, and therefore, it should be denied.

CONCLUSION

For all of the above reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

Counsel of Record for Respondent
Daniel B. Horwitch
Statewide Bar Counsel
Statewide Grievance Committee
Second Floor - Suite Two
287 Main Street
East Hartford, CT 06118-1885
Telephone (860) 568-5157
May 15, 1997

No. 96-1666

In The

Supreme Court Of The United States

October Term, 1996

JOHN C. KUCEJ,

Petitioner,

v.

STATEWIDE GRIEVANCE COMMITTEE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

APPENDIX

Sec. 27F. **Filing Complaints; Action; Time Limitation**

(a) Any person, or a grievance panel on its own motion, may file a written complaint alleging attorney misconduct whether or not such alleged misconduct occurred in the actual presence of the court. Complaints against attorneys shall be filed with the statewide bar counsel. Within seven days of the receipt of a complaint the statewide bar counsel shall:

(1) forward the complaint to a grievance panel in the judicial district in which the respondent maintains his principal office or his residence, provided that, if the respondent does not maintain such an address in this state, the statewide bar counsel shall forward the complaint to any grievance panel; and

(2) notify the complainant and the respondent, by certified mail with return receipt, of the panel to which the complaint was sent. The notification to the respondent shall be accompanied by a copy of the complaint.

The respondent shall have the right to respond within ten days of receipt of notification. The response shall be sent to the grievance panel to which the complaint has been referred.

The statewide bar counsel shall keep a record of all complaints filed. The complainant and the respondent shall notify the statewide bar counsel of any change of address or telephone number during the pendency of the proceedings on the complaint.

(b) If for good cause a grievance panel declines, or is unable pursuant to Sec. 27B (b), to investigate a complaint, it shall forthwith return the complaint to the statewide bar counsel to be referred by him or her immediately to another panel. Notification of such referral shall be given by the statewide bar counsel to the complainant and the respondent by certified mail with return receipt.

(c) The grievance panel, with the assistance of the grievance counsel assigned to it, shall investigate each complaint to determine whether probable cause exists that the attorney is guilty of misconduct.

(d) Investigations and proceedings of the grievance panel shall be confidential unless the attorney under investigation requests that such investigation and proceedings be public.

(e) The complainant and respondent shall be entitled to be present at any proceedings on the complaint at which testimony is given and to have counsel present, provided, however, that they shall not be entitled to examine or cross-examine witnesses unless requested by the grievance panel.

(f) The panel shall, within ninety days from the date the complaint was referred to it, file the following with the statewide grievance committee: its written determination concerning whether probable cause exists that the respondent is guilty of misconduct, a copy of the complaint and response, a transcript of any testimony heard by the panel, a copy of any investigatory file and copies of any documents, transcripts or other written materials which were available to the panel. These materials shall constitute the panel's record in the case. The panel may file a motion for

extension of time not to exceed thirty days with the statewide grievance committee which may grant the motion only upon a finding of good cause. If the panel does not complete its action on a complaint within the time provided in this section, the statewide committee shall inquire into the delay and shall order that the panel take action on the complaint forthwith, or order that the complaint be forwarded to and heard by another panel or a reviewing committee designated by the statewide grievance committee.

(g) The panel shall notify the complainant and the respondent of its determination. The determination shall be a matter of public record.

Sec. 27J **Action by Statewide Grievance Committee or Reviewing Committee**

(a) Upon receipt of the record from a grievance panel, the statewide grievance committee may assign the case to a reviewing committee which shall consist of at least three members of the statewide grievance committee, at least one third of whom are not attorneys. The statewide grievance committee may, in its discretion, reassign the case to a different reviewing committee. The committee shall regularly rotate membership on reviewing committees and assignments of complaints from the various grievance panels. An attorney who maintains an office for the practice of law in the same judicial district as the respondent may not sit on the reviewing committee for that case.

(b) The statewide grievance committee and the reviewing committee shall have the power to issue a subpoena to compel any person to appear before it to testify in relation to

any matter deemed by the statewide grievance committee or the reviewing committee to be relevant to the complaint and to produce before it for examination any books or papers which, in its judgment, may be relevant to such complaint. Any such testimony shall be on the record.

(c) If the grievance panel determines that probable cause exists that the respondent is guilty of misconduct, the statewide grievance committee or the reviewing committee shall hold a hearing on the complaint. If the grievance panel determines that probable cause does not exist, the statewide grievance committee or the reviewing committee shall review the determination of no probable cause, take evidence if it deems it appropriate and, if it determines that probable cause does exist, thereafter hold a hearing. All hearings following a determination of probable cause shall be public and on the record.

(d) The complainant and respondent shall be entitled to be present at all hearings and other proceedings on the complaint at which testimony is given and to have counsel present. At all hearings the respondent shall have the right to be heard in his own defense and by witnesses and counsel. The complainant and the respondent shall not be entitled to examine or cross examine witnesses unless requested by the reviewing committee. At the conclusion of the evidentiary phase of a hearing, the complainant and the respondent shall have the opportunity to make a statement, either individually or through counsel. The statewide grievance committee or reviewing committee may request oral argument.

(e) Within ninety days of the date the grievance panel filed its determination of probable cause or no probable cause with the statewide grievance committee, the reviewing

committee shall render its proposed decision and file it with the statewide grievance committee. The reviewing committee's record in the case shall consist of a copy of all evidence it received or considered, including a transcript of any testimony heard by it, and its proposed decision. The record shall also be sent to the statewide grievance committee. In its proposed decision, the reviewing committee shall recommend either dismissal of the complaint, the imposition of sanctions as authorized by Sec. 27M.1 or presentment of the respondent to the superior court. The reviewing committee shall forward a copy of the proposed decision to the complainant and the respondent. The proposed decision shall be a matter of public record. The reviewing committee may file a motion for extension of time not to exceed thirty days with the statewide grievance committee which shall grant the motion only upon a showing of good cause. If the reviewing committee does not complete its action on a complaint within the time provided in this section, the statewide committee shall, on motion of the complainant or the respondent or on its own motion, inquire into the delay and determine the appropriate course of action.

(f) If the reviewing committee finds probable cause to believe the respondent has violated the criminal law of this state, it shall report its findings to the statewide grievance committee.

(g) Within fourteen days of the issuance to the parties of the proposed decision by the reviewing committee, the complainant and the respondent may submit to the statewide grievance committee a statement in support of, or in opposition to, the proposed decision.

(h) If the statewide grievance committee does not assign a complaint to a reviewing committee, it shall have one hundred and twenty days from the date the panel's determination concerning probable cause was filed with it to render a decision dismissing the complaint, imposing sanctions and conditions as authorized by Sec. 27M.1 or directing the statewide bar counsel to file a presentment against the respondent. The decision shall be a matter of public record. The failure of a reviewing committee to complete its action on a complaint within the period of time provided in this section shall not be cause for dismissal of the complaint.

Section 27M **Action by Statewide Grievance Committee**

Within sixty days of the expiration of the fourteen day period for the filing of the statement under Section 27J(g), the statewide grievance committee shall issue a written decision either dismissing the complaint, imposing sanctions and conditions as authorized by Section 27M.1, directing the statewide bar counsel to file a presentment against the respondent in the superior court or referring the complaint to the same or a different reviewing committee for further investigation and a proposed decision. Before issuing its decision, the statewide grievance committee may, in its discretion, request oral argument. The statewide grievance committee shall forward a copy of its decision to the complainant, the respondent and the grievance panel which investigated the complaint. The decision shall be a matter of public record. If the statewide grievance committee finds probable cause to believe that the respondent has violated the criminal law of this state, it shall report its findings to the chief state's attorney.